Supreme Court, U.S.
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No. 03-502

In The
Supreme Court of the United States

TOWER INSURANCE COMPANY,

Petitioner,

v.

TRINITY EVANGELICAL LUTHERAN CHURCH AND SCHOOL-FREISTADT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Wisconsin Supreme Court properly determined that the punitive damage award of $3,500,000 did not violate the protections afforded by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

PARTIES TO PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Trinity Evangelical Lutheran Church and School – Freistadt is a religious institution incorporated pursuant to the provisions of §187.01, WIS. STATS., with no parent and/or subsidiary corporations.

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STATEMENT ON JURISDICTION

This Court is without jurisdiction pursuant to 28 U.S.C. §1257 because the Petitioner, despite having the opportunity to do so, failed to properly raise the specific federal issue cited in the petition in a proper manner before the Wisconsin Supreme Court prior to the decision in *Trinity Evangelical Lutheran Church v. Tower Insurance Co.*, 2003 WI 46, ¶29-¶43, ___ Wis.2d ___, 661 N.W.2d 789 (2003). Moreover, the Petitioner's request for Supreme Court review is based solely on the claim that the Wisconsin Supreme Court failed to apply what is established law and, hence, fails to set forth an important question of federal law, thereby providing an additional basis for this Court's lack of jurisdiction.

STATEMENT OF THE CASE

The Petition for Certiorari filed by Tower Insurance Company contains a selective and incomplete recitation of facts. In addition, the Petition is replete with misstatements of fact and erroneous characterizations of the decisions rendered by the Wisconsin Court of Appeals and the Wisconsin Supreme Court. For this reason, the respondent provides the court with the following alternative, and accurate, statement of the case.

Prior to 1994, Trinity Evangelical Lutheran Church & School ("Trinity") was insured by Heritage Insurance through Hackbarth Insurance Service, Inc. Because the teachers for Trinity would on occasion, in the course of their employment, transport students to and from certain functions, Trinity carried hired and non-owned automobile coverage with limits of liability of $500,000 per person and $500,000 per accident. The policy was scheduled for renewal on February 10, 1994.

Prior to renewal, members of Trinity's insurance committee contacted the agency of Rodrian & Associates, Inc. for a competitive insurance quote, dealing directly with Jim Rodrian ("Rodrian"). During their discussions, Trinity informed Rodrian that they required hired and non-owned vehicle coverage as part of their liability policy. In the summary judgment proceedings and at trial, there was no dispute that Trinity had requested that Rodrian include hired and non-owned vehicle coverage in its policy.

Rodrian & Associates is an independent insurance agency that does business with, among others, Tower Insurance Company ("Tower"). Rodrian approached Tower and requested a quote for coverage on Trinity, dealing specifically with an underwriter named Harold Fischer ("Fischer"). Rodrian provided Fischer with basic information regarding the risk and discussed the fact that Trinity wanted hired and non-owned automobile coverage on the policy. Rodrian subsequently received a quote from Fischer which he believed included the requested hired and non-owned coverage. Rodrian provided this information to Trinity's insurance committee. The committee subsequently accepted Tower's quote. Fischer then authorized Rodrian to bind coverage on behalf of Tower. R. 102: Exhibit "E", p.p. 16-20, 38-42; Exhibit "F", p.p. 65-68, Exhibit "H"; R. 183: 260-275; R. 177: Exhibit 28.

On February 10, 1994, Rodrian forwarded a binder to Trinity which included coverage for hired and non-owned automobiles. After the binder was sent to Trinity, an application was filled out for the issuance of the policy. Due to a change in the application form, however, Rodrian failed to check the box requesting hired and non-owned insurance coverage. R.102: Exhibit "E", p.p. 37, 38; Exhibit "J"; R. 183: 267-271: R. 177: Exhibit 17. Tower subsequently issued a policy to Trinity without the hired and

non-owned coverage. Neither the representatives at Tower, Rodrian, nor Trinity spotted this error.

On January 24, 1995, Lorrie Erdman, a teacher at Trinity, while transporting students from the school in the course of her employment, ran a stop sign and collided with a vehicle driven by Suzanne Rather. The collision resulted in serious injury to Suzanne Rather and her passenger, Matthew Warren.

Trinity subsequently notified Rodrian of the potential claim. Upon review of the policy, Rodrian discovered that there was no hired and non-owned vehicle coverage indicated. In a letter to Carol Blackwell ("Blackwell"), a District Manager in Tower's Underwriting Department, dated January 31, 1995, Rodrian informed Tower of the accident and of the fact that he inadvertently failed to request non-owned vehicle coverage on the application. R.102: Exhibit "K", p.p.12, 13, Exhibit "L"; R. 183: 271-272: R. 177: Exhibit 1.

In response to this letter, Blackwell drafted a memo to Gene Gallagher ("Gallagher") – Vice President, Director of Operations at Tower, and the highest ranking official at Tower to review the coverage issue that arose as a result of Rodrian's clerical error. The Blackwell memo recited the circumstances surrounding the error, mentioned Rodrian's request to backdate coverage and requested direction from Gallagher as to how he wanted the matter handled. R. 102: Exhibit "O"; R. 177: Exhibit 12.

Fully understanding that reformation of the policy was being requested, Gallagher nonetheless denied coverage, authoring the following handwritten note:

> Carol – Your referral says that this is agency error and not ours. We didn't get request to provide [hired and non-owned coverage] didn't get copy of binder till now, so [we] don't have any reason to

> backdate. Suggest agent [Jim Rodrian] alert his E and O carrier if he hasn't already. I'm not going to put backdate and add with uncertainty as to possible exposure. We could be facing big dollars due to liab[ility]?? If you want to discuss further let me know. Gene

R.102: Exhibit "M", p.p. 19, 20; Exhibit "N"; R. 184: 125-140; R. 177: Exhibit 13. Thus, Gallagher made the decision to deny coverage in less than 48 hours without attempting to determine whether Trinity had, in fact, requested and/or been provided coverage for hired and non-owned vehicles. R: 102: Exhibit "M", p.p. 74-76, 94-99; R. 184: 156-157.

Tower was subsequently asked on numerous occasions to reconsider its decision. R. 102: Exhibits "P", "Q" and "R"; R. 177: Exhibits 14, 31, 34. One request for reconsideration came from Jim Reynolds, the adjuster for Rodrian's Errors and Omissions carrier, Utica Mutual Insurance Company (Utica).[1] The Reynolds letter included a citation to the Wisconsin Supreme Court's 1969 decision in *Trible v. Tower Insurance Company*, 43 Wis.2d 172, 168

[1] Despite statements in Tower's Petition to the contrary, Utica was never involved in any "coverage dispute" with Tower over Trinity's loss. (Tower Petition, p. 2.) Utica was the E & O insurer for Rodrian, not an insurer of Trinity, and the evidence introduced at trial by Reynolds made it clear that, in light of the mutual mistake in the issuance of the policy, Utica had no intention of honoring any claim by Trinity. More important, the continuing claim by Tower that coverage for Trinity was a debatable question based on the fact Utica might cover Trinity's loss under its E & O policy is a direct violation of Wisconsin Administrative Code §Ins. 6.11(2)(a)(9), which prohibits an insurer from denying coverage based upon the claim that "responsibility for the payment should be assumed by other persons or insurers." Tower's claim that this case is about nothing more than a legitimate "dispute about insurance coverage" between two insurers is a misstatement of fact that evidences Tower's disregard for the law.

N.W.2d 148 (1969), the seminal case in Wisconsin addressing the obligation of an insurer to reform an insurance contract upon the discovery of a mutual mistake in the issuance of the written policy. Based on facts almost identical to those confronted by Tower when it received Trinity's request for coverage, the Wisconsin Supreme Court in *Trible* determined that reformation of the insurance policy was required. Gallagher did not read the case and Tower continued to refuse to entertain any settlement proposals from any of the parties injured in the accident. R. 102: Exhibit "M", p.p. 113-15, 121-139; R. 184: 164-171.

Circuit Court Proceedings

In early 1998, lawsuits were filed by Matthew Warren and Suzanne Rather, the occupants of the vehicle that was struck by Erdman, naming Erdman and Trinity as defendants. Tower undertook the representation of Trinity under a reservation of rights. That representation, however, was limited solely to the issue of liability for the accident. Contrary to the implications in Tower's Petition (Tower Petition, p. 4), it never retained counsel to represent Trinity on the issue of coverage. Tower did, however, retain its own attorney to obtain a determination from the court on the insurance coverage question.

On May 18, 1998, Tower filed a motion for summary judgment. In this motion Tower requested summary judgment solely on the basis of the language of the written policy, arguing to the court that the written policy did not provide coverage to Trinity for the loss. Tower conducted no discovery prior to filing the motion for summary judgment. R. 177: Exhibit 46, 48. Furthermore, nowhere in the moving papers did Tower bring to the court's attention the fact that the written policy was in error because of a mistake by Tower's own agent. Trinity, in response, hired attorney Robert Holtz ("Holtz") to represent the church on

the question of insurance coverage. Holtz subsequently filed an action for reformation and breach of contract against Tower. Shortly thereafter, Tower withdrew its motion for summary judgment.

On September 28, 1998, Trinity deposed Tower's former underwriter, Harold Fischer ("Fischer"). During the course of Fischer's deposition, Trinity discovered that in June of 1995 Rodrian hired his own investigator to track down Fischer. A statement signed by Fischer and provided to the investigator verified the fact that Rodrian had requested that Fischer include hired and non-owned vehicle coverage in Trinity's policy. Only after the filing of the action for reformation and the completion of Fischer's deposition by Mr. Holtz did Tower "voluntarily" reform the policy and agree to cover the loss. (*See* Tower petition, p. 15). On October 5, 1998, Trinity amended its cross-claim to assert a bad faith cause of action against Tower.

Tower subsequently filed a motion for summary judgment seeking dismissal of the bad faith claim. In its written decision, the trial court determined that Trinity was entitled to reformation of the insurance policy as a matter of law. The court further concluded that Tower's conduct constituted bad faith pursuant to the standard set forth by the Wisconsin Supreme Court in *Anderson v. Continental Insurance Company*, 85 Wis.2d 675, 677, 271 N.W.2d 368 (1978), and granted summary judgment for Trinity pursuant to §802.08(6), WIS. STATS.[2] Pet. App. 65a.

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[2] Section 802.06(6), WIS. STATS., provides: "If it shall appear that the party against whom a motion for summary judgment is asserted is entitled to summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor."

Subsequent to this decision, the only factual issue left for determination by the jury was whether punitive damages attached. After hearing several days of testimony, the jury determined that, based on evidence that was clear and convincing, Tower acted "in an intentional disregard of the rights of the plaintiff," and awarded $3,500,000 in punitive damages.[3] Tower's numerous motions after verdict were denied by the court, and judgment was entered on the verdict on March 15, 2001.

Intermediate Appellate Court Decision

Tower filed an appeal of the trial court's final judgment. The court of appeals reversed the trial court's judgment and remanded the case for a trial on the issue of whether Tower acted in bad faith when it denied coverage to Trinity. *Trinity Evangelical Lutheran Church v. Tower Insurance Co.*, 2002 WI App 46, ¶21, 251 Wis.2d 212, 641 N.W.2d 504 (Ct.App. 2002); Pet. App. 52a-55a.

In addition to remanding the case for trial on the bad faith claim, the court of appeals upheld the jury's finding that Tower intentionally disregarded Trinity's rights and its award of $3,500,000 in punitive damages. *Id.* at ¶28-¶42; Pet. App. 58a-64a. Applying the standards established by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), the court found that Tower had clearly engaged in reprehensible conduct:

[3] In Wisconsin, punitive damages are recoverable only upon a showing of an "intentional disregard of the rights of the plaintiff" and only based on evidence that is "clear and convincing." §895.95, WIS. STATS.

> Gallagher's decision to deny coverage within twenty-four to forty-eight hours without knowing whether Trinity had actually requested hired and non-owned automobile coverage and without contacting Trinity to determine this shows an intentional disregard to Tower's insured. Gallagher's decision not to seek the available in-house legal counsel regarding Rodrian's requests for backdating shows a reckless disregard toward Tower's insured. Gallagher's decision not to contact Fischer, Tower's own underwriter with whom Rodrian worked on the Trinity policy, about whether he understood Trinity to have requested hired and non-owned coverage shows a reckless disregard of Trinity in the face of its agent's representation that Trinity had requested coverage. Tower's decision to send its attorney to the court and ask for summary judgment without ever informing the court of the dispute regarding Rodrian's error and request for backdating shows **blatant disrespect** for its insured and the court. We have no trouble finding that the reprehensibility factor has been met under *BMW*.

Trinity, 2002 WI App. 46, ¶38; Pet. App. 62a-63a (emphasis added). Finding the punitive damage award to represent a 7 to 1 ratio of punitive damages to the potential harm to Trinity had Tower succeeded in its attempt to avoid liability for the loss, the court upheld the punitive damage verdict. *Id.* at ¶40; Pet. App. 63a-64a. Both Tower and Trinity sought review by the Wisconsin Supreme Court.

Wisconsin Supreme Court Decision

The Wisconsin Supreme Court reversed the court of appeal's decision to remand the case back to the trial court for a trial on the issue of bad faith. Finding that the only

reasonable inference to be drawn from the evidence is that Tower acted in bad faith, the Wisconsin Supreme Court affirmed the trial court decision granting Trinity summary judgment. *Trinity Evangelical Lutheran Church v. Tower Insurance Co.,* 2003 WI 46, ¶29-¶43, ___ Wis.2d ___, 661 N.W.2d 789 (2003); Pet. App. 9a-13a.

In addition, the Wisconsin Supreme Court affirmed the decision by the court of appeals upholding the jury's $3,500,000 punitive damage verdict. *Id.* at ¶44-¶69. In assessing the jury's verdict, the Wisconsin Supreme Court applied not only the test set forth by this Court in *Gore*, but also the analysis utilized by this Court in *State Farm Mutual Automobile Insurance Company v. Campbell,* 538 U.S. ___, 123 S.Ct. 1513 (2003). Viewing the evidence introduced at trial, the Wisconsin Supreme Court, like the court of appeals, had no difficulty finding that Tower had engaged in reprehensible conduct:

> These decisions, acts, and omissions on the part of Gallagher, on behalf of Tower, illustrate a continuing, egregious, and flagrant pattern of disregard toward Tower's duty owed to its insured, Trinity. As a result, we conclude that the egregiousness and reprehensibility factor has been met under the *BMW* test.

Trinity, 2003 WI 46, ¶62; Pet. App. 23a. Like the court of appeals, the Wisconsin Supreme Court also found that the punitive damage verdict represented a 7 to 1 ratio of punitive damages to the potential harm. Applying the standard established in *Gore* and reiterated in *Campbell*, the court upheld the jury's punitive damage verdict. *Id.* at ¶70; Pet. App. 27a. It is from this decision by the Wisconsin Supreme Court that Tower now seeks review by the United States Supreme Court.

ARGUMENT SUPPORTING DENIAL OF PETITION

I. TOWER HAS WAIVED THE RIGHT TO CHALLENGE THE WISCONSIN SUPREME COURT'S APPLICATION OF THIS COURT'S DECISION IN *CAMPBELL*.

The foundation for Tower's request for Supreme Court review is the Wisconsin Court's application of this Court's recent decision in *Campbell*. According to Tower, the decision in *Campbell* represents "a sea change in the law of punitive damages" because it sets forth "new standards requiring more vigorous review by state and federal courts." (Tower Petition, p. 10.) Tower's request for Supreme Court review is bold, indeed, considering its conduct in proceedings before the Wisconsin Court.

The decision in *Campbell* was released by this Court in slip opinion form on April 7, 2003. That very day, Civil Trial Counsel of Wisconsin (CTCW), as *amicus curiae*, filed the *Campbell* decision with the Wisconsin Supreme Court as supplemental authority. In conformance with the Wisconsin Rules of Appellate Procedure[4], Trinity filed a response outlining why *Campbell* did not warrant a reversal of the punitive damage award. Forty-six days after the release of *Campbell*, the Wisconsin Supreme Court released its decision in *Trinity*. During this entire forty-six day time period, Tower stood by silently, making no attempt to supplement the record or outline its argument as to why *Campbell* required a reversal of the trial court's judgment. If *Campbell* represents a "sea change" in

[4] Section 809.19(10), WIS. STATS., allows a party to file supplemental authorities with the appellate court, after briefing, along with a letter explaining, among other things, the proposition that the authority supports. Section 809.19(11), WIS. STATS., provides opposing counsel 11 days to respond.

the law that ***must*** be considered by the court in order to reach a result that conforms with constitutional due process, query why Tower chose not to cite to or offer any argument concerning *Campbell* prior to the release of the decision in *Trinity*?[5]

It is axiomatic that an appellate court, let alone the highest appellate court in the land, will generally not review any argument not raised in the court below. *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941); *United States v. Bean*, 537 U.S. 71, 123 S.Ct. 584, 587 n.2, 154 L.Ed.2d 483 (2002). This established rule of appellate procedure is based on the principle that it is fundamentally unfair to fault the lower court for failing to rule correctly on an issue it was never given the opportunity to fully consider. This Court has specifically held that, when raising a federal question for Supreme Court review, it is essential that the question be raised, presented, and pursued in a timely and proper manner at the appropriate point in the state court proceedings. *Godchaux Co. v. Estopinal,* 251 U.S. 179, 181, 40 S.Ct. 116, 64 L.Ed. 213 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). In fact, this Court has no jurisdiction to exercise its appellate power over state court judgments under 28 U.S.C. §1257 unless a federal question has been both raised and decided in the state court below. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).

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[5] Although Tower did raise *Campbell* in its motion for reconsideration subsequent to the Wisconsin Supreme Court deciding *Trinity*, raising the question for the first time is insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station WOW v. Johnson,* 326 U.S. 120, 128, 65 S.Ct. 1475, 89 L.Ed. 569 (1945). The Wisconsin Supreme Court refused to entertain Tower's motion for reconsideration.

Tower cannot be allowed to sit silently by while the Wisconsin Supreme Court is left to apply the holding in *Campbell* and then criticize the Wisconsin Court's holding and attempt to obtain appellate review by the highest court in the land once it receives a decision that is not to its liking. Tower's conduct evinces a complete disregard for the judicial process. Because Tower failed to cite *Campbell* as controlling authority before the Wisconsin Supreme Court, despite having the opportunity to do so prior to the issuance of the *Trinity* decision, Tower has waived any right to seek review by this court based upon the argument that the Wisconsin Supreme Court somehow ignored or misapplied the *Campbell* decision.

II. TOWER'S CLAIM THAT THE WISCONSIN SUPREME COURT MISAPPLIED THIS COURT'S DECISION IN *CAMPBELL* IS NOT A BASIS FOR GRANTING CERTIORARI.

In *Campbell*, this Court reiterated the importance of a reasoned application of the three guideposts established in *Gore*, 517 U.S. 559. Elaborating on these guideposts, this Court highlighted several factors for consideration by state and federal courts when engaged in a de novo due process review of punitive damages.

The decision in *Campbell* was cited as supplemental authority to the Wisconsin Supreme Court well before the release of the decision in *Trinity*. In the text of the *Trinity* decision, the *Campbell* case is cited, quoted, analyzed and applied by the court. *Trinity*, 2003 WI 46, ¶52 n.6, ¶58-¶60, ¶64, ¶66. Tower can cite no language from the *Trinity* decision that in any way contradicts or misstates any portion of this Court's holding in *Campbell*. Hence, Tower's entire petition centers on the claim that the Wisconsin Supreme Court, although properly stating the rule of law established by this Court in *Campbell*, misapplied the law

to the specific facts in the pending litigation. Trinity takes issue with Tower's claim that the Wisconsin Supreme Court misapplied *Campbell*. *See infra* §III. However, even if Tower were correct in its characterization of the Wisconsin Supreme Court's decision, its petition completely fails to set forth a basis for Supreme Court review.

The importance of the issue involved in any given case has always been of major significance to this Court in determining whether to grant a writ of certiorari. As a consequence, this Court has typically limited discretionary review of decisions coming out of the state courts to only those cases that involve important constitutional questions. *Zucht v. King*, 260 U.S. 174, 176, 43 S.Ct. 24, 67 L.Ed.194 (1922). In fact, Rule 10 of the RULES OF THE SUPREME COURT OF THE UNITED STATES, which sets forth the appropriate reasons for granting a writ of certiorari, has specifically incorporated the requirement that the case involve an "important federal question." SUP. CT. R. 10.

It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of error in lower court decisions. The Court's role, rather, is to determine questions of constitutional importance. It is then the role of the lower courts to apply these principles to the great mass of cases. The responsibility of this Court has been characterized as too great to require it to correct every perceived error by lower courts in the application of accepted principles. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §4.17 (7th Ed. 1993). As Justice Rehnquist observed in *Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." The Court's aversion to error correction has been codified in Rule 10 of the RULES OF THE SUPREME COURT OF THE UNITED STATES:

> A petition for writ of ceriorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

SUP. CT. R. 10.

Tower's petition asks for nothing more than error correction based on the alleged misapplication of established law, i.e., *Campbell*, by the Wisconsin Supreme Court. As such, Tower's petition does not involve a substantial federal question but, rather, a question of importance merely to the litigants in the pending action. This Court has adopted a practice of limiting the acceptance of appeals to only those cases that involve the settlement of issues that are of importance to the public, as opposed to merely the parties. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1954). Tower has provided this Court with no reason to deviate from this accepted practice.

As an alternative to full-blown appellate review, Tower suggests that acceptance and summary reversal "would guide the courts throughout the country as to *Campbell's* significance in analyzing punitive damage awards." (Tower Petition, p. 11.) In conjunction with this suggestion, Tower cites a string of recent cases that have been remanded by this Court for further consideration in light of *Campbell*. (Tower Petition, p. 10, n.4.) The state and federal courts involved in every one of the cases cited by Tower never had the opportunity to review or apply this Court's decision in *Campbell*. In each case, *Campbell* was decided ***after*** the lower court rendered its decision on appeal. As a consequence, since the release of the opinion in *Campbell*, this Court has been remanding claims involving a due process challenge to a punitive damage award back to the lower court for "further consideration in light of" *Campbell*. *See Romo v. Ford Motor Co.*, 122

Cal.Rptr.2d 139 (Cal.Ct. App. 2002), *vacated by* 123 S.Ct. 2072 (2003)

Obviously, the pending action is quite different than those cases cited in Tower's petition. This Court's decision in *Campbell* was released prior to the Wisconsin Supreme Court's decision in *Trinity*. Accordingly, the Wisconsin Supreme Court has already had the opportunity to consider this case "in light of" *Campbell*. The Wisconsin Supreme Court has cited, quoted, analyzed and applied *Campbell* to the punitive damage award by the jury. Consequently, it would be pointless to do as Tower suggests, and remand this case back to the Wisconsin Supreme Court for further consideration.

It is also specious for Tower to argue that summary reversal under the circumstances of this case would provide guidance to courts regarding the significance of the decision in *Campbell*. The specific circumstances surrounding the jury's award of punitive damages in this case are much different than the circumstances surrounding the jury's award in *Campbell*. In addition, the analysis engaged in by the Wisconsin Supreme Court in this case is much different than the analysis engaged in by the Utah Supreme Court in *Campbell*. *See infra*, §III. Contrary to Tower's assertions, summary error correction by this Court on a case so factually and legally dissimilar to *Campbell* will only create confusion and speculation by state and federal courts throughout the country as to exactly what "error" this Court is attempting to correct.

Tower requests Supreme Court review solely for the purpose of error correction on an issue that, although important to Tower as a litigant in this case, is of no constitutional importance to the general public. The very foundation of Tower's petition for certiorari – the alleged "misapplication" of *Campbell* by the Wisconsin Supreme Court – falls far short of an important federal question

that warrants United States Supreme Court review. Thus, this Court should deny Tower's petition.

III. APPLYING THE PRINCIPLES SET FORTH IN *CAMPBELL*, THE WISCONSIN SUPREME COURT CORRECTLY DETERMINED THAT THE JURY'S PUNITIVE DAMAGE VERDICT DID NOT VIOLATE TOWER'S DUE PROCESS RIGHTS.

Even if Tower is correct in its assertion that a mere misapplication of established law can be a sufficient basis for this Court granting the petition, there is no misapplication evident on this record. The Wisconsin Supreme Court engaged in a reasoned analysis of the facts in this case, applying principles previously established by this Court, and correctly concluded that the jury's punitive damage verdict did not violate Tower's due process rights. Even if this case were accepted for review, Tower would not succeed on the merits.

While states possess discretion over the imposition of punitive damages, it is well-established that there are procedural and constitutional limitations on these awards. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *Gore,* 517 U.S. at 562. The reason is that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a State may impose." *Id.* at 574.

In recognition of these concerns, this Court established in *Gore,* and reiterated in *Campbell*, certain

guideposts that must be applied to the facts surrounding a jury's punitive damage verdict. This Court requires that the reviewing court, in assessing the constitutionality of the jury's verdict, consider (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Gore*, 517 U.S. at 575; *Campbell*, 123 S.Ct. at 1521. In addition, when applying these guideposts, the reviewing court is required to apply a de novo standard of review to the determinations of the lower court. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001).

The Wisconsin Supreme Court correctly applied each of these principles in the present case. *Trinity*, 2003 WI 46, ¶47-¶69. Although the result reached by the Wisconsin Supreme Court in *Trinity* differs from that reached by this Court in *Campbell*, the principles applied by both courts in reviewing the jury's punitive damage verdict were identical. The result in *Trinity* was different from the result in *Campbell* solely because, on its facts, *Trinity* is a completely different case. Tower ignores this reality by taking certain language in *Campbell* out of context and stretching this Court's holding beyond the realm of reason. Consequently, in assessing the merits of Tower's petition, it is important to consider what *Campbell* does and does not say.

A. Reprehensibility of Tower's Conduct.

Campbell reiterates that "the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's

conduct." *Campbell*, 123 S.Ct. at 1521 (*citing Gore*, 517 U.S. at 575). Primarily because punitive damages should reflect the enormity of the defendant's offense. *Gore*, 517 U.S. at 575 (*citing Day v. Woodworth*, 13 How. 363, 371, 14 L.Ed. 181 (1852)). This principle reflects the accepted view that some wrongs are more blameworthy than others. *Id.* at 575-576.

In *Trinity,* the conduct engaged in by the defendant was much different in character and in scope than the conduct engaged in by the defendant in *Campbell*. Viewing the evidence in a light most favorable to the jury's verdict, the court in *Trinity* found the reprehensibility of Tower's conduct to be clear from the record. *Trinity,* 2003 WI 46, ¶57. In fact, the court characterized Tower's conduct as "a continuing, egregious, and flagrant pattern of disregard toward [its] duty to its insured, Trinity." *Id.* at ¶62. That is quite different than the conclusion reached by this Court in *Campbell*.

In *Campbell*, this Court found that the punitive damage award, which amounted to $145 million, was based primarily upon evidence, improperly introduced at trial, regarding State Farm's allegedly fraudulent claims handling practices occurring outside the State of Utah. These alleged practices were dissimilar in nature to the acts that formed the foundation for the plaintiff's claim of bad faith against State Farm before the Utah court. This Court determined that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as a basis for punitive damages." *Campbell*, 123 S.Ct. at 1523. In addition, upon an independent review of the evidence, the Court found that the "Campbells have identified scant evidence of repeated misconduct of the sort that injured them." *Id.* Such is not the case when one reviews the record before the Wisconsin Supreme Court in *Trinity*.

Thirty years prior to the accident giving rise to the coverage dispute in *Trinity*, Tower Insurance was the defendant in *Trible v. Tower Insurance Company*, 43 Wis.2d 172, the seminal case in Wisconsin addressing the obligation of an insurer to reform an insurance contract upon the discovery of a mutual mistake in the issuance of a written policy. In *Trible*, the Wisconsin Supreme Court, based on facts nearly identical to those presented to Tower when it denied coverage to Trinity, informed Tower of its duty to reform an insurance policy upon discovery of a mutual mistake. Although not a bad faith case, *Trible* was viewed by the Wisconsin Supreme Court as a case that clearly advised Tower of its obligations under the law. *Trinity,* 2003 WI 46, ¶57.

Despite knowledge of its obligations under *Trible*, Tower proceeded to deny coverage to Trinity without conducting any investigation of the claim. Tower made no attempt to verify coverage with its insured and, in fact, didn't even bother to speak to its own underwriter to confirm whether the church had requested the coverage. *Id.* at ¶62. In addition, Tower never sought advice from available in-house counsel prior to denying coverage to the church. *Id.* at ¶62. Tower maintained its denial of coverage, despite repeated requests that it reconsider its position. These requests included a letter from the agent's E & O carrier that cited the holding in *Trible*. *Id.* at ¶14.

Assessing the conduct of the defendant, the conclusions of the Wisconsin Court are quite different than the conclusions reached in *Campbell*. In the eyes of the Wisconsin Supreme Court, Tower's conduct made it a repeat offender or "recidivist," thereby requiring more severe punishment than that visited upon a party that engages in an individual instance of malfeasance. *Id.* at ¶59. According to the court, "the state has an interest in deterring Tower, and others, from ignoring applicable decisions of

this court as to its duty to its insured, and then later claiming ignorance of what such duty entails." *Id.* at ¶54.

Relying on the opinion of Justice Sykes, who authored the dissent in *Trinity*, Tower challenges the finding that it was a "recidivist" based on the fact that there was no finding of bad faith as a result of the denial in *Trible*. (Tower Petition, p. 15.) Consequently, according to Tower, it is being punished for "dissimilar actions in a case that occurred decades ago." *Id.* Tower's argument, and Justice Sykes' dissent, places form over substance.

A recidivist is one with a tendency to relapse into a habit of activity that he/she knows is wrong. As the court explained in *U.S. v. Montenegro-Rojo,* 908 F.2d 425, 429-30 (9th Cir.1991):

> The recidivist's relapse into the same criminal behavior demonstrates his lack of recognition of the gravity of his original wrong, entails greater culpability for the offense with which he is currently charged, and suggests an increased likelihood that the offense will be repeated yet again . . . [T]he very fact that the defendant continued to act in a way previously adjudicated to be wrongful somehow makes him more blameworthy the second time around. Moreover, it suggests that the defendant is likely to engage in illegal conduct yet again, which would justify departure based on endangerment of public safety. Indeed, the guidelines specifically allow for departure based on prior similar adult criminal conduct not resulting in a criminal conviction.

Over thirty years ago the Wisconsin Supreme Court in *Trible* told Tower that it was unlawful to deny insurance coverage to its insured based on the facts presented. In 1995, confronted with almost identical facts, Tower consciously disregarded the Wisconsin Supreme Court's

directive and denied coverage to its insured. The Wisconsin Court was correct in concluding that Tower is a recidivist willing to flaunt the pronouncements of Wisconsin's highest court.[6]

When confronted with a recidivist, "strong medicine is required to cure the defendant's disrespect for the law." *Gore*, 116 S.Ct. at 1599. Tower's decision to consciously disregard its obligations under the law, in the face of its prior involvement as the defendant in *Trible*, represented to the Wisconsin Supreme Court the most significant fact in support of the jury's punitive damage verdict. This conscious disregard of the directives from Wisconsin's highest court sets the facts in *Trinity* far apart from those confronted by this Court in *Campbell*.

In addition, there was compelling evidence that Tower engaged in trickery and deceit during its handling of the coverage dispute; a level of deceit that is unequaled in any reported decision in Wisconsin dealing with a claim of insurance bad faith. Once litigation was commenced against Trinity, while Trinity was unrepresented on the issue of coverage, Tower affirmatively moved for summary judgment with the trial court based solely on the written insurance policy. At no time did Tower inform the court of the agent's alleged error. *Trinity,* 2003 WI 46, ¶62.

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[6] There are independent grounds for determining that Tower is a recidivist that were not cited in the Wisconsin Supreme Court's opinion in *Trinity*. According to Gallagher, when he denied the request for coverage, he was comporting with the ordinary business practice of Tower when confronted with this type of situation. In fact, Gallagher testified that he had denied coverage to insureds under similar circumstances on close to ten prior occasions. Gallagher's testimony laid the foundation for a conclusion by the jury that it was company policy to deny coverage in violation of Wisconsin insurance regulations.

Although Tower may not have physically altered documents, it attempted to pass off an erroneous document as a valid insurance contract in an attempt to avoid liability on a large claim. Worse still, it perpetrated its deceit against the court that had the authority to extinguish the contractual rights of its insured. As the Wisconsin Court of Appeals observed in its decision affirming the punitive damages, "Tower's decision to send its attorney to the court and ask for summary judgment without ever informing the court of the dispute regarding [the agent's] error and request for backdating shows blatant disrespect for its insured and the court." *Trinity,* 2002 WI App 46, ¶38; Pet.App. 63a.

In an effort to divert attention from its egregious and reprehensible conduct, Tower attempts to focus this Court's attention on the nature of the harm suffered by Trinity, pointing out that Trinity suffered only "economic harm." According to Tower, *Campbell* reaffirms the proposition that, in cases of economic harm, punitive damages are generally not appropriate. (Tower Petition, p. 11.) How can *Campbell* reaffirm a proposition that has never been established by this Court? Some of the most significant cases decided by this Court on the subject of punitive damages have involved purely economic harm. *Haslip*, 499 U.S. 1; *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *Gore,* 517 U.S. 559. In none of these cases did this Court ever hold that punitive damages were unwarranted. In fact, in *Haslip* and *TXO*, both cases involving solely economic harm, this Court affirmed awards of $840,000 and $10,000,000 respectively. Even in *Campbell*, this Court's remand made it clear that punitive damages are recoverable in cases involving economic harm.

Whether the harm suffered by the plaintiff is physical or economic is clearly a factor for consideration by a

reviewing court in assessing whether a punitive damage award comports with due process. *Campbell,* 123 S.Ct. at 1521. However, there is no support for Tower's argument that this one factor is somehow dispositive. Nowhere in the decision in *Campbell* does this Court disavow its prior holdings in *Haslip* and *TXO*. In fact, both cases are cited with approval. *Id.* at 1519, 1520, 1523, 1524, 1526. As these two cases clearly indicate, significant punitive damages can be awarded under circumstances of egregious corporate conduct, even when the case involves only economic harm. Such egregious corporate conduct is clearly evident on the record in this case.

Tower's knowing disregard for the rulings of Wisconsin's highest court, coupled with its disrespect for its own insured and the trial court assigned to resolve the coverage dispute can be classified as conduct far more reprehensible than that confronted by this Court in *Campbell*. Thus, it is no surprise that the facts surrounding Tower's conduct led to a finding of bad faith as a matter of law by the trial court, and led the trial court and two appellate tribunals to affirm the jury's $3,500,000 penalty.

B. Ratio Of Punitive Damages To Actual/ Potential Harm.

The second *Gore* guidepost, which was reaffirmed in *Campbell*, requires that the reviewing court examine the ratio between the punitive damage award and not just the actual harm suffered by the plaintiff, but also the potential harm to the plaintiff had the defendant succeeded in its scheme. *Gore*, 517 U.S. at 575. Tower argues in its petition that the use of "potential" harm in the calculation of the damage ratio is a "fictitious theory" concocted by Trinity and blindly embraced by the Wisconsin Supreme Court. (Tower Petition, p. 13.) One need only review the record in this case and recent decisions from this Court on

the issue of punitive damages to conclude that Tower is twisting both the facts and the law beyond the realm of reason.

The dual approach of considering both actual and potential harm in determining the damage "ratio," far from being some "fictitious theory," was first advocated by this Court in *TXO*, 509 U.S. 443, embraced as one of the constitutional "guideposts" in *Gore*, 517 U.S. at 575, and reaffirmed in this Court's recent decision in *Campbell*. Nowhere in *Campbell* is there language to support Tower's contention that this Court has somehow disavowed an analysis that focuses on the "potential" harm to the plaintiff. (*See* Tower Petition, p. 13.) Quite to the contrary, in *Campbell* this Court specifically reaffirmed that, when applying the second factor of the *Gore* test, a reviewing court must consider "the disparity between the actual ***or potential*** harm suffered by the plaintiff and the punitive damages awarded." *Campbell*, 123 S.Ct. at 1520 (emphasis added). Consequently, Tower's unwavering insistence that this case involves a ratio, under *Gore*, of 200 to 1 is contrary to both the facts and the law.

The facts in the present case are much more akin to the facts presented to this Court in *TXO* than they are to the facts in *Campbell*. Therefore, this Court's holding in *TXO* is far more instructive on the issue of the constitutionality of the jury's punitive damage verdict. In *TXO*, this Court was confronted with a punitive damage award in a slander of title action wherein the ratio of punitive damages to the actual harm suffered by the plaintiffs was 526 to 1. Upholding the award despite this ratio, this Court "eschewed an approach that concentrates entirely on the relationship between actual and punitive damages." *TXO*, 509 U.S. at 460. Instead, this Court considered "the magnitude of the potential harm that the defendant's

conduct would have caused its intended victim if the wrongful plan had succeeded." *Id.* The actual damage was low ($19,000 in attorney fees) but the potential harm to the plaintiff was significant (anywhere between $1,000,000 and $8,000,000). Because of the egregious nature of the defendant's conduct and the significant potential harm said conduct posed to the plaintiff, this Court calculated the damage ratio based on potential harm. Ultimately this Court held that, in a case of egregious conduct that exposes the plaintiff to significant economic harm, the court need not consider "the dramatic disparity between actual damages and the punitive damage award controlling . . . " *Id.* at 462.

The facts in the pending action are barely distinguishable from those in *TXO*. Egregious conduct on the part of Tower created a situation where, although the actual harm to Trinity was not substantial ($17,000 in attorney fees), the potential harm was significant ($490,000). Tower clearly had sufficient notice that such egregious conduct could result in substantial punitive damages if the potential harm to the plaintiff was significant. Well before Tower denied Trinity's claim, Wisconsin courts had recognized the relevancy of considering potential harm when evaluating the question of punitive damages. *Fahrenberg v. Tengel*, 96 Wis.2d 211, 291 N.W.2d 516 (1980). Hence, at trial, both parties were given the opportunity to introduce evidence and argue to the jury on the issue of potential harm. *Trinity,* 2003 WI 46, ¶65. The potential harm posed by the defendant's conduct was actually one of the factors the jury was specifically instructed to consider when determining punitive damages.

See WIS. J.I.-CIVIL 1707.1.[7] *Trinity*, 2003 WI 46, ¶45, n.5. Viewing the facts in a light most favorable to the verdict, the jury determined that the potential harm to Trinity was $490,000.[8] As a consequence, pursuant to Wisconsin law and this Court's holding in *TXO*, the Wisconsin Supreme Court was compelled to calculate the damage ratio based on the $490,000 in potential harm posed to Trinity.

In *Campbell*, because the situation was quite different than in *TXO* and the present case, the facts did not compel a similar result. In *Campbell,* this Court did not focus on potential harm in calculating the damage ratio. It failed to do so not because this Court was somehow disavowing an approach based on potential harm but, rather, because an analysis of potential harm was not necessary in order to assess the constitutionality of the punitive damage verdict reached by the jury. The pertinent facts in *Campbell* with regard to actual and potential harm are actually directly opposite the facts in *TXO* and the pending case. In *Campbell* the actual harm was substantial ($1,000,000 in damages for emotional distress) and the potential harm was far less ($135,000 excess judgment over and above State Farm's $50,000 policy limit). *Id.* at 1518. The addition of potential harm to the actual damages would have had no appreciable impact on the ratio because of the significant compensatory damage award by the jury and the jury's $145,000,000 punitive damage verdict. As a

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[7] WIS. J.I.-CIVIL 1707.1 instructs the jury to consider the potential damage which might have been done by the defendant's acts as well as the actual damage when awarding punitive damages.

[8] When reviewing an award of punitive damages, the court must give deference to the factual findings by the jury. As this Court observed in *Cooper*, 532 U.S. 424, 439, n.14, "nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damage award, to disregard such jury findings."

consequence, potential harm was not a relevant factor in the constitutional analysis in *Campbell*. In fact, it was never referenced in this Court's decision.

Contrary to Tower's assertions, *Campbell* does not disavow the use of potential harm in calculating the damage ratio. Nor does *Campbell* indicate that significant punitive damages cannot be sustained in cases involving only economic harm. To the contrary, this Court concluded:

> [B]ecause there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages."

Campbell, 123 S.Ct. at 1524. This is just such a case.

As this Court observed in *Campbell*, "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1, *id.*, at 582, 116 S.Ct. 1589, or, in this case, of 145 to 1." *Id.* The ratio of punitive damages to potential harm to Trinity was properly determined to be 7 to 1. *Trinity*, 2003 WI 46, ¶65. In light of Tower's egregious conduct and the potential harm that conduct threatened to Trinity, there is nothing about this ratio that shocked the constitutional sensibilities of the trial court, the Wisconsin Court of Appeals, or the Wisconsin Supreme Court. If certiorari were granted, the result before this Court would be controlled by the holding in *TXO* and would, therefore, be no different.

C. The Disparity Between The Punitive Damages Awarded And Available Civil Or Criminal Penalties.

The last guidepost in *Gore,* which was also reaffirmed in *Campbell,* requires the reviewing court to assess the difference between the punitive damages awarded and the available civil or criminal penalties imposed in comparable cases. *Gore*, 517 U.S. at 1520. In a most amazing contortion of the law, Tower takes this Court's holding with respect to this third guidepost, to which this Court devoted all of two paragraphs in its decision,[9] and characterizes it as the central holding in *Campbell.* (Tower Petition, p. 12.) According to Tower, not only is the comparison of punitive damages to available civil penalties important, this Court's decision in *Campbell* makes such an analysis "dispositive." (*Id.*).

Let us examine the practical absurdity of Tower's position on this issue. If a $10,000 fine under §601.64(4), WIS. STATS., is the basis for determining the ratio in any bad faith case litigated in the State of Wisconsin, and that ratio is now dispositive as alleged by Tower, one would assume that any award in excess of nine times (more than a single-digit multiplier) the penalty, i.e. $90,000, would be constitutionally suspect. In Tower's world there would be, in effect, no meaningful punitive damages recoverable against insurance carriers in insurance bad faith actions in Wisconsin. The effect such an interpretation of the law would have on deterring Tower and others from engaging in similar wrongful conduct is obvious.

Not only is Tower's argument practically untenable, it is legally incorrect. As this Court indicated in *Campbell,*

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[9] "Here, we need not dwell long on this guidepost." *Campbell*, 123 S.Ct. at 1526.

the existence of penalties is important in determining the seriousness with which the State views the wrongful action. *Campbell*, 123 S.Ct. at 1526. "When used to determine the dollar amount of the award, however, the criminal penalty has less utility." *Id.* Contrary to Tower's assertion, nothing in *Campbell* indicates that this factor is dispositive on the constitutional propriety of the jury's award.

With regard to the seriousness with which the State views Tower's offense, one must consider not only the $10,000 criminal penalty under §601.64(4), WIS. STATS., but also the civil penalties available under Wisconsin law. Section 601.64(3)(a), WIS. STATS., outlines additional civil sanctions that can be imposed upon violation of Wisconsin insurance regulations:

> (a) *Restitutionary forfeiture.* Whoever violates any . . . insurance statute or rule . . . shall forfeit to the state twice the amount of any profit gained from the violation, in addition to any other forfeiture or penalty.

As set forth in detail previously, Tower was positioned to profit to the tune of $490,000 had it gotten away with its attempt to avoid coverage for Trinity's loss. Taking into consideration the criminal sanctions already identified by Tower, the total criminal *and* civil sanctions that were potentially available amount to $990,000. Under Wisconsin law, Tower clearly had notice that its offenses could potentially yield significant civil and criminal penalties.

Unfortunately, Tower's conduct has not even been investigated by the Wisconsin Insurance Commissioner, let alone has it resulted in the imposition of civil or criminal penalties. In the absence of any civil or criminal penalty imposed to date, the third *Gore* factor has little utility in assessing the constitutionality of the jury's punitive damage verdict. All it tells this Court is that there are stiff penalties in Wisconsin for the type of

conduct engaged in by Tower which are not enforced. Under the circumstances, the Wisconsin Supreme Court was correct when it determined that this third factor did not require that the jury's damage award be vacated on constitutional grounds.

CONCLUSION

Nothing in the decision of the Wisconsin Supreme Court in *Trinity* in any way contradicts this Court's holding in *Campbell*. At best, Tower's petition requests review solely based on the Wisconsin Supreme Court's alleged misapplication of established law. This Court is not a court of error correction. Because Tower has failed to present a significant federal question requiring Supreme Court review, its petition should be denied.

In addition, there is no basis for Tower's claim that the Wisconsin Supreme Court misapplied the law. In *Trinity* the Wisconsin Supreme Court correctly determined that the jury's punitive damage verdict comports with due process pursuant to the holding in *Campbell* and, more specifically, *TXO*. Having little chance of success on the merits, Tower has failed to establish a sufficient basis for Supreme Court review.

Respectfully submitted,

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